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In the Supreme Court of the United States

TRACY RAGSDALE, ET AL., PETITIONERS

v.

WOLVERINE WORLDWIDE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA or Act) requires covered employers to provide eligible employees with "a total of 12 workweeks of leave during any 12-month period" for specified reasons, 29 U.S.C. 2612(a)(1), including leave needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," 29 U.S.C. 2612(a)(1)(D). The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. 2654. The question presented is as follows:

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. 2601 *et seq.*, provides that

> an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period * * *
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. 2612(a)(1)(D). The Act confers an equivalent right on any eligible employee who wishes to take leave in order to care for a newborn or newly adopted child, or for a close relative with a serious health condition. 29 U.S.C. 2612(a)(1)(A)-(C). The term "eligible employee" is defined to mean an employee who, *inter alia*, "has been employed

* * * for at least 12 months by the employer with respect to whom leave is requested." 29 U.S.C. 2611(2)(A)(i).

An employer may comply with its obligations under the FMLA by providing unpaid leave. 29 U.S.C. 2612(c). The Act provides, however, that "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under [29 U.S.C. 2612(a)(1)(C) or (D)] for any part of the 12-week period of such leave under such subsection." 29 U.S.C. 2612(d)(2)(B). The Act expressly preserves and encourages more generous leave policies, both those voluntarily adopted by employers and those mandated by state law. 29 U.S.C. 2651-2653.

The FMLA requires employees to give their employers advance notice of foreseeable leave, 29 U.S.C. 2612(e), and allows employers to require medical certification when leave is sought for a serious health condition, 29 U.S.C. 2613. With certain exceptions, the Act entitles employees to job restoration in the same or an equivalent position upon their return from leave, and requires employers to maintain employees' group health benefits while on leave. 29 U.S.C. 2614(a) and (c). It is "unlawful for any employer to interfere with, restrain, or deny the exercise" or attempted exercise of any FMLA right. 29 U.S.C. 2615(a)(1). Either the affected employee or the Secretary of Labor is authorized to bring suit to enforce the Act. 29 U.S.C. 2617 (1994 & Supp. V 1999). Employers are required to post a notice of FMLA rights in a form approved by the Secretary. 29 U.S.C. 2619(a); see 29 C.F.R. 825.300(a). The Secretary has prepared a prototype notice for that purpose, which is reprinted in Appendix C to Part 825 of 29 C.F.R., and which is also available from local offices of the Wage and Hour Division of the Department of Labor (DOL).

b. The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. 2654. Pursuant to that authority, the DOL has promulgated detailed regulations concerning the process by which employers and employees are to communicate with each other regarding FMLA leave. See 29 C.F.R. 825.207(d)(1), 825.208, 825.300-825.312, 825.700(a). Those regulations provide that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided" in Section 825.208 of the regulations. 29 C.F.R. 825.208(a). "The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing," but if it is oral, it must be confirmed in writing by the following payday. 29 C.F.R. 825.208(b)(2). Under Section 825.208, "[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. 825.208(b)(1).

The regulations contain a specific provision addressing the substitution of *paid* leave for FMLA leave. Under that provision, "[i]f the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave," or at a later date if the employer initially lacks knowledge of the information necessary to make the designation. 29 C.F.R. 825.208(c). That provision then states that "[i]f the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason * * * and

fails to designate the leave as FMLA leave," and to notify the employee as required by 29 C.F.R. 825.208(b),

> the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 C.F.R. 825.208(c). Another regulation, which applies to both paid and unpaid leave, provides that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. 825.700(a).

The DOL regulations also require the employer to communicate specified information regarding the employee's rights and responsibilities under the FMLA to the employee at the time he requests leave for reasons that trigger the FMLA. 29 C.F.R. 825.301(b). The written notice must state "that the leave will be counted against the employee's annual FMLA leave entitlement." 29 C.F.R. 825.301(b)(1)(i). The notice must also inform the employee of, *inter alia*, "the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution," 29 C.F.R. 825.301(b)(1)(iii); "any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments," 29 C.F.R. 825.301(b)(1)(iv); and "the employee's right to restoration to the same or an equivalent job upon return from leave," 29 C.F.R. 825.301(b)(1)(vii). The required written notice "must be provided to the employee no less often than the

first time in each six-month period that an employee gives notice of the need for FMLA leave." 29 C.F.R. 825.301(c). A prototype notice is contained in Appendix D to Part 825 of 29 C.F.R., and is also available from local offices of DOL's Wage and Hour Division. See 29 C.F.R. 825.301(b)(2).

2. a. On March 17, 1995, petitioner Tracy Ragsdale began her employment with respondent Wolverine Worldwide, Inc. Pet. App. A2. Petitioner was diagnosed with cancer in February 1996, and on February 21, 1996, she requested and received medical leave. *Ibid.* Respondent's leave policy allowed employees with at least six months of service to take leave for up to seven months, on the condition that the employee submit a request for extension of leave every 30 days. *Ibid.* In addition to petitioner's initial request for leave, respondent granted six extensions of leave, the last coming on August 15, 1996. *Ibid.* During that period, respondent did not notify petitioner of her eligibility for leave under the FMLA, nor did it designate petitioner's leave as FMLA leave. *Ibid.* Respondent states in this Court that it was aware of the Act but believed that petitioner was not eligible for FMLA leave because she had not worked for respondent a full 12 months at the time her leave initially commenced. Br. in Opp. 2 n.1.

Neither of the opinions below explicitly states whether petitioner's leave was paid or unpaid. Respondent asserted below (see Resp. C.A. Br. 4) that the leave was unpaid, however, and the opinions of the court of appeals and district court implicitly suggest that petitioner did not continue to receive her regular pay during the leave period. Thus, the court of appeals stated that during the leave, "[respondent] maintained [petitioner's] health insurance benefits, and even exceeded the requirements of the FMLA by paying [petitioner's] insurance premiums for six months. Moreover, [respondent] held [petitioner's] position open for her during the entire thirty weeks of leave." Pet. App. A11; see *id.* at

B7. The absence of any reference to payment of wages indicates the unpaid status of petitioner's leave.

On September 20, 1996, petitioner was terminated because she had exhausted her seven months of company leave and was unable to return to work. Pet. App. A2. On September 26, 1996, petitioner requested additional FMLA leave or, in the alternative, permission to return to work on a reduced hour schedule. *Id.* at A3. Respondent denied both requests. *Ibid.* Petitioner's physician released her to work in December 1996, and she has been employed in full-time positions since December 31, 1996. *Ibid.* The parties appear to have litigated the case on the assumption that petitioner could have returned to work at the expiration of seven months of company leave plus 12 weeks of FMLA leave, had respondent permitted those periods of leave to run sequentially.

b. Petitioner brought suit against respondent, asserting claims under, *inter alia*, the FMLA. Pet. App. B2. The district court granted respondent's motion for summary judgment on the FMLA claim. *Id.* at B4-B9. The court held that petitioner was eligible for FMLA leave as of March 18, 1996, the date on which she requested her first extension of leave, even though she was not eligible on February 21, 1996, when she first took leave, because she had not yet completed 12 months of employment with respondent. *Id.* at B4-B6. The court further held, however, that petitioner was not entitled to 12 weeks of FMLA leave in addition to the seven months of leave she had already received. The court acknowledged that under the DOL regulations, respondent's failure to designate petitioner's leave as FMLA leave would preclude respondent from counting that leave against the statutory 12-week entitlement. *Id.* at B6-B7. The court concluded, however, that the DOL regulations were invalid because they "added requirements which not only go beyond those of the statute, but which are inconsistent with the stated

purpose of the statute and which would grant entitlements which were not given by Congress." *Id.* at B8 (quoting *Cox* v. *AutoZone, Inc.*, 990 F. Supp. 1369, 1381 (M.D. Ala. 1998), aff'd *sub nom. McGregor* v. *AutoZone, Inc.*, 180 F.3d 1305 (11th Cir. 1999)).

c. The court of appeals affirmed. Pet. App. A1-A12. The court concluded that "the DOL's regulations improperly 'convert[] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave.'" *Id.* at A7 (quoting *McGregor* v. *AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999)). Because the "terms of the statute contemplate only that the employer will be required to provide a 'total' of twelve weeks of unpaid leave," the court stated, "twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." *Ibid.* The court of appeals recognized that 29 C.F.R. 825.208(a) requires an employer to designate leave, paid or unpaid, as FMLA qualifying and to notify the employee of that designation, and that two separate regulations—29 C.F.R. 825.208(c) (dealing with paid leave) and 825.700(a) (dealing with paid and unpaid leave)—provide that the failure to designate leave as FMLA leave will result in the employee's retaining his 12-week FMLA entitlement. Pet. App. A5-A6. The court also recognized that under 29 U.S.C. 2612(d)(2)(B), which specifically addresses paid leave, "[a]n eligible employee may elect, or an employer may require the employee, to substitute" certain types of accrued paid leave for "any part of the 12-week" FMLA leave. Pet. App. A8. The court concluded, however, that Section 2612(d)(2)(B) does not support the Secretary's regulatory approach across the board. The court stated that "the Secretary of Labor has apparently seized upon the 'employer may require' provision in § 2612(d)(2)(B) to justify the

imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." *Id.* at A9.

The court of appeals stated that notice requirements imposed by other provisions of the FMLA "strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute." Pet. App. A9 (citing 29 U.S.C. 2612(e)(1), 2614(b)(1)(A)-(B), 2619). The court also relied on portions of the legislative history stating that the FMLA was designed to establish a minimum labor standard for leave, and indicating that the 12-week leave period was a compromise between the family needs of workers and the business needs of employers. *Id.* at A9-A10. The court concluded that "[t]he DOL regulations must be struck down" because they "create rights which the statute clearly does not confer." *Id.* at A10.

The court stated, however, that situations could arise "in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights." Pet. App. A10. As an example, the court pointed out that "notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." *Id.* at A10-A11 (citing *Longstreth* v. *Copple*, 189 F.R.D. 401 (N.D. Iowa 1999)). The court also recognized that "in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave." *Id.* at A11.

In the instant case, however, where respondent's leave program was "far more generous than the baseline established by the FMLA," and petitioner's "medical condition

rendered her unable to work for substantially longer than the FMLA twelve-week period," the court of appeals concluded that applying the notice regulations would "directly contradict the statute by increasing the amount of leave that an employer must provide." Pet. App. A11. Under those circumstances, the court found that treating what it characterized as respondent's "technical violation" of the designation regulations "as a denial of [petitioner's] FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA." *Ibid.* On that basis the court held that 29 C.F.R. 825.700(a) is "invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time." Pet. App. A11.

DISCUSSION

The court of appeals erred in holding invalid a DOL regulation, 29 C.F.R. 825.700(a), that is designed to ensure that employees covered by the FMLA are able to make informed choices concerning the exercise of their statutory rights. The instant case is not an optimal vehicle, however, for deciding whether that regulatory provision is valid. And while the court of appeals' decision is in substantial tension with the ruling of the Sixth Circuit in *Plant* v. *Morton International, Inc.*, 212 F.3d 929 (2000), no square circuit conflict exists, since that case involved *paid* leave and therefore focused on a separate regulation, 29 C.F.R. 825.208(c). The petition for certiorari should therefore be denied.

1. "Where the empowering provision of a statute states simply that the agency may 'make . . . such rules * * * as may be necessary to carry out the provisions of this Act,' * * * the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation and footnote omitted). The FMLA vests the Secretary of Labor

with broad authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. In light of Congress's express conferral of legislative rulemaking authority, a court in applying the Secretary's FMLA regulations "must accord the [Secretary's] assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

The regulation at issue in this case—29 C.F.R. 825.700(a)—complements other regulatory provisions intended to provide employees covered by the FMLA with adequate information concerning their rights and responsibilities under the Act. As we explain above (see p. 2, *supra*), "[e]very employer covered by the FMLA is required to post and keep posted on its premises * * * a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act." 29 C.F.R. 825.300(a). The prototype notice prepared by DOL is cast in general terms and provides a succinct overview of the FMLA's requirements and prohibitions. See 29 C.F.R. Pt. 825 App. C.

Under the regulations, an employer is required to provide an additional notice—notice that is both more comprehensive and somewhat more tailored to the circumstances of the individual worker—at the time that an employee requests leave for an FMLA-covered purpose. See 29 C.F.R. 825.301(b) and (c); Pt. 825 App. D. That regulatory mandate reflects the Secretary's determination that the FMLA's purposes cannot adequately be realized if workers are unaware of their rights and responsibilities under the Act. Recent empirical studies indicate that most employees know too little about the FMLA to be able to take advantage of its protections on their own. Surveys of randomly-selected employees in FMLA-covered establishments in 1995 and

2000 showed that only 59% of those employees had even heard of the Act, a percentage that did not increase between 1995 and 2000. D. Cantor, et al. & U.S. Dep't of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* 3-10 (Jan. 2001). Similarly, a recent survey of human resources professionals suggested that only 29% of employees and 31% of line managers and supervisors understand the FMLA. Society for Human Resource Management, *2000 FMLA Survey* (Jan. 2001).

The Secretary's regulations sensibly require that employees who have actually requested leave for an FLMA-covered reason—and who are therefore especially in need of information regarding the Act's provisions—must receive more detailed and specific notice concerning the Act than is required to be posted for the work force generally. It should be noted, in this regard, that because employers typically provide some form of parental and disability leave, an employee's request for leave for an FMLA-covered reason does not by itself evidence familiarity with the terms of the Act.[1] An understanding of the Act's provisions therefore may substantially assist the worker, who may have rights under the Act (*e.g.*, entitlement to a longer period of leave, and to restoration to the same or an equivalent job) that go beyond the terms of the employer's own leave policy.

As a practical matter, an employee's full understanding of his rights and responsibilities under the FMLA requires an awareness that a particular period of leave will be counted

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[1] The DOL regulations make clear that an employee will be treated as having requested FMLA leave (thereby triggering the notice provisions of 29 C.F.R. 825.301) if he requests leave for an FMLA-covered *reason*. 29 C.F.R. 825.302(c), 825.303(b). "The employee need not expressly assert rights under the FMLA or even mention the FMLA." 29 C.F.R. 825.302(c), 825.303(b). Thus, the request for leave will not necessarily reflect the employee's awareness that the FMLA exists, let alone a thorough understanding of the worker's rights and responsibilities under the Act.

against his 12-week annual entitlement under the Act. The designation and notice requirements contained in 29 C.F.R. 825.208(a), 825.208(c), and 825.700(a)—*i.e.*, the requirements that an employer must determine and inform the employee in advance that a particular leave period will be treated as FMLA leave—are therefore properly understood as part of a larger regulatory effort to make the FMLA's protections meaningful by increasing employee understanding of the Act's provisions. Those requirements impose no onerous burden on the employer. In order to ensure compliance with the Act, the employer must necessarily make its own internal determination whether particular leave periods will be treated as FMLA leave. The regulations at issue in this case simply direct the employer to make that determination at the outset of the leave period (to the extent that is feasible) and to communicate that determination promptly to the affected employee.

The pertinent regulatory provisions also state, as a categorical matter, that particular periods of leave will not be counted against an employee's annual 12-week entitlement under the FMLA if the employer fails to give timely notice that the leave will be so treated. See 29 C.F.R. 825.208(c), 825.700(a). That prophylactic rule will sometimes place the employee in a better position than if the employer had provided the required notice in a timely fashion. In the instant case, for example, the effect of 29 C.F.R. 825.700(a) is to afford petitioner a viable cause of action under the FMLA, even though she would have been physically unable to return to work within 12 weeks if respondent had promptly informed her that her leave would be counted against the FMLA limit. The Secretary has reasonably determined, however, that the predictability and ease of administration of a categorical rule make it preferable to a regime in which an individual's entitlement to relief under the Act would turn on a potentially difficult retrospective inquiry into what

steps the employee might have taken had he received timely notice. Cf. *Mourning*, 411 U.S. at 374 (agency may by rule "require[] some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control," in order to provide "a reasonable margin to insure effective enforcement"). As the agency explained when it promulgated the final rule, the pertinent regulatory provisions were "intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted 'after the fact' disputes." 60 Fed. Reg. 2180, 2207 (1995).[2]

2. The court of appeals in this case observed that "[t]he FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." Pet. App. A7. The court noted as well that "[e]ntirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to

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[2] The DOL regulations make clear that paid vacation or personal leave provided under an employer's own policies may be counted against the employee's 12-week FMLA entitlement if the leave is in fact used for an FMLA-covered purpose, even if the employee's request for leave does not mention that purpose. The regulations explain, by way of example, that if an employee requests and receives two weeks of paid vacation leave, and suffers a serious injury midway through the two-week period, the employer may designate the second week as FMLA leave and may count that time against the employee's 12-week entitlement. 29 C.F.R. 825.208(d). The potential for confusion, and for disagreement between the employer and employee as to whether particular leave should be counted against the 12-week entitlement, is especially great when the employee's leave request does not explicitly invoke an FMLA-covered purpose. The preamble to 29 C.F.R. 825.208 suggests a particular focus on such situations. See 60 Fed. Reg. at 2207-2208. Sections 825.208(c) and 825.700(a) apply by their terms, however, even in cases like this one, where petitioner's request for leave was explicitly premised on the existence of a serious health problem.

additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA qualifying leave." *Id.* at A7-A8. The court of appeals found the regulatory provisions at issue in this case to be inconsistent with the balance struck by Congress. That analysis is misconceived.

Nothing in the DOL regulations requires any employer to allow any employee to take more than 12 weeks of leave for an FLMA-covered purpose. Nor do the regulations make such a requirement a necessary or even likely consequence of an employer's decision to adopt its own leave program. To limit an employee's leave entitlement to the 12 weeks specified by the Act, an employer need only provide timely notice that a particular period will be counted as FMLA leave. Absent any reason to believe that compliance with that requirement will be difficult or onerous–and the court of appeals offered none—the court erred in concluding that the Secretary's regulatory approach would subvert the balance struck by Congress.

The FMLA states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter [29 U.S.C. 2611-2619]." 29 U.S.C. 2615(a)(1). The expert agency has reasonably concluded that an employee's informed exercise of FMLA rights requires prior notice that particular periods of leave will be counted against the worker's 12-week statutory entitlement. An employer that treats particular periods as FMLA leave after failing to provide the requisite notice may properly be said to "interfere with" or "restrain" the employee's exercise of his rights under the Act, even though the employee receives 12 weeks of leave.

Indeed, the court of appeals in this case "stressed that the court [wa]s not holding that any DOL regulations requiring employers to designate leave as FMLA leave would be

invalid." Pet. App. A10. The court observed, by way of example, that "notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." *Id.* at A10-A11. Even in that situation, however, the effect of the challenged regulations is to require the employer to allow more than 12 weeks of leave for an FMLA-covered reason, based on the employer's non-compliance with the regulatory notice requirement. Thus, the court of appeals' decision ultimately rests on the fact that the Secretary has chosen to promulgate a categorical rule, rather than to mandate a case-specific inquiry into whether a particular employee suffered actual prejudice as a result of the employer's failure to provide timely notice. But while the Secretary might have adopted a regime of the sort the court of appeals preferred, she was not required to do so. Given the breadth of the Secretary's rulemaking authority under the Act (compare *Mourning*, 411 U.S. at 369-378), and the evident desirability of avoiding difficult retrospective inquiries into the presence or absence of prejudice in individual cases (see pp. 12-13, *supra*), the agency acted within its sphere of lawful discretion in proceeding by way of a prophylactic rule.

3. At the time that petitioner initially requested leave, she had worked for respondent for less than a year and therefore was not an "eligible employee" within the meaning of the FMLA. See 29 U.S.C. 2611(2)(A)(i) ("eligible employee" must have been "employed * * * for at least 12 months by the employer with respect to whom leave is requested"); see also Pet. App. B4. In the district court, respondent contended that petitioner's "eligibility for FMLA leave must only be determined on the date that leave first commenced," and that her FMLA claim should be dismissed

on that ground. *Ibid.* The district court rejected that argument, holding that petitioner had become an "eligible employee" by the time that she submitted her first request for extension of leave and accordingly was entitled to the protections of the Act. See *id.* at B4-B6.

The district court's holding was correct. See 29 C.F.R. 825.110(b) ("If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer * * *, the week counts as a week of employment" in determining whether the individual has been "employed" by the employer for the requisite 12 months.). The circumstances described above mean, however, that the notice question arises here in an atypical factual context. The pertinent DOL regulations direct the employer to designate leave as FMLA leave either at the time that leave is requested, or at such later time as the employer acquires new information indicating that leave has been taken for an FMLA-covered reason. See, *e.g.*, 29 C.F.R. 825.208(c) (stating, with respect to paid leave, that "[t]he employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced"). The regulations do not specifically contemplate (and we are aware of no other judicial decision addressing) the situation presented here, where the notice requirement was triggered neither by the initial leave request, nor by the acquisition of new information bearing on the reasons for which leave was taken, but by petitioner's newly acquired status as an "eligible employee."

4. Petitioner contends (Pet. 11) that the court of appeals' decision in this case "is in direct conflict with" the Sixth Circuit's decision in *Plant* v. *Morton International, Inc.*, 212 F.3d 929 (2000). In our view, although there is considerable

tension between the two decisions, there is no square conflict.[3]

In *Plant*, an employee suffered a workplace injury on April 26, 1996, and thereafter took paid disability leave. 212 F.3d at 932. His employment was terminated on June 7, 1996. *Ibid.* Thus, if Plant was in fact dismissed from employment based on his disability and ensuing leave (an allegation that the company denied, see *id.* at 932-933), there was no dispute that the company had failed to provide the 12 weeks of leave mandated by the FMLA. The company contended, however, and the district court agreed, that Plant was not entitled to relief under the FMLA because he would have been physically unable to return to work until August 5, 1996—more than 12 weeks after his injury—even if he had not been fired at an earlier time. *Id.* at 934.

The Sixth Circuit rejected that argument on the ground that the employer had "never informed Plant that it was counting his paid absence against the statutory FMLA allowance," and that under 29 C.F.R. 825.208(c) Plant's 12-week leave entitlement under the Act had therefore never begun to run. 212 F.3d at 934-935. The Sixth Circuit concluded that

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[3] Neither *Manuel* v. *Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995), nor *Cline* v. *Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998), also cited by petitioner (see Pet. 13-14), conflicts with the court of appeals' decision in this case. The court in *Manuel* considered and approved DOL regulations providing that an employee may effectively invoke the protections of the FMLA by requesting leave for an FMLA-covered reason, even if he does not mention the Act. 66 F.3d at 761-763; see note 1, *supra*. Although the court briefly noted the employer's duty under the DOL regulations to designate leave as FMLA-qualifying, see 66 F.3d at 762, it did not discuss either 29 C.F.R. 825.208(c) or 29 C.F.R. 825.700(a). The court in *Cline* did apply Section 825.700(a), see 144 F.3d at 300-301 & n.1, but the employer in that case did not contest the validity of the regulation. Although petitioner relies in part on those decisions, she acknowledges (Pet. 14) that "neither *Cline* nor *Manuel* directly addressed the validity of the regulations at bar."

> § 825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the statute. * * * Moreover, because the FMLA was intended to set out *minimum* labor standards, we do not believe that § 825.208(c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than twelve weeks of leave in one twelve-month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of leave.

Id. at 935-936.

Plant is distinguishable from the instant case on two bases. First, the employer in *Plant* dismissed the plaintiff less than 12 weeks after the plaintiff's leave commenced. The court did not—as in this case—award additional leave as a result of the employer's failure to give prior notice that Plant's leave would count against his FMLA entitlement, but rather relied on that failure only in rejecting the employer's contention that no FMLA violation had occurred because Plant would have been physically unable to return to work at the conclusion of a 12-week leave period. Second, the employee in *Plant* requested and received *paid* leave, and the Sixth Circuit's decision focused primarily on 29 C.F.R. 825.208(c), which addresses only paid leave. In the instant case, the opinions below rather strongly suggest, though they do not expressly state, that petitioner's leave was unpaid, see pp. 5-6, *supra*, and the Eighth Circuit in the end invalidated only 29 C.F.R. 825.700(a), which addresses both paid and unpaid leave. Pet. App. A11. Indeed, in identifying the other judicial decisions that have addressed the DOL regulations, the court of appeals in this case described the Sixth Circuit's decision in *Plant* as "distinguishing between notice requirements for paid as opposed to

unpaid leave," while also noting that the Sixth Circuit "appear[ed] to uphold both 29 C.F.R. §§ 825.208(c) and 825.700(a) as valid exercises of regulatory power." Pet. App. A11. Because the FMLA provides an entitlement only to unpaid leave, see 29 U.S.C. 2612(c), and because the Act itself contains a specific subsection (29 U.S.C. 2612(d)) addressing the substitution of paid leave for leave provided under the FMLA, the judgment that underlies 29 C.F.R. 825.208(c) and 825.700(a)—*i.e.*, that an employee who requests leave for an FMLA-covered purpose may be unaware that the leave will count against the 12-week FMLA entitlement—may apply with somewhat greater force when the employee requests paid leave.

For the foregoing reasons, we do not believe that the court of appeals' decision in this case squarely conflicts with the Sixth Circuit's decision in *Plant*. There is, to be sure, considerable tension between the two decisions. Although the employee in *Plant* was dismissed less than 12 weeks after the commencement of leave, the Sixth Circuit's decision does not suggest that its approval of the regulatory notice requirement was dependent on that fact. The court in *Plant* did attach significance to the fact that the case involved paid leave: it distinguished its prior decision in *Cehrs* v. *Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998), on the ground that "the employee in *Cehrs* had taken unpaid leave rather than paid leave; therefore, the court had no occasion to address § 825.208(c), which appears to govern only those cases in which an employer wishes to designate paid leave as FMLA leave." 212 F.3d at 935 (citation omitted). However, the court of appeals in *Plant* recognized that 29 C.F.R. 825.700(a) "prescribe[s] almost identical notice rules when employers wish to designate unpaid leave as FMLA leave," 212 F.3d at 935 n.1, and it expressed its disagreement with several other decisions that held that 29 C.F.R. 825.208(c) and 825.700(a)

were in conflict with the FMLA's creation of an entitlement to 12 weeks of leave, "conclud[ing] that those regulations are valid and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run," 212 F.3d at 936.

5. Issues concerning the Secretary's implementation of the FMLA may ultimately warrant resolution by this Court. On balance, however, we believe that the petition for certiorari in this case should be denied. We agree that considerable tension exists between the court of appeals' decision in this case and the Sixth Circuit's decision in *Plant*. In the end, however, we believe that because this case appears to involve unpaid leave and *Plant* involved paid leave, and because for that reason the decisions focus on separate regulations, the difference in the result in the two cases is not such as to warrant review by this Court at the present time. The anomalous factual circumstances involved in this case, moreover, make it a less than optimal vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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